law they have to be "any new building" built or completed after the prescribed date. Section 4(2)(a) of our Control of Rent Act, 1966 speaks of "building completed after 31st January, 1948". If in the Hong Kong case the shops built on the old foundation of the former building were held to be "entirely new" and in the Singapore case to be a "new building", a fortiori the shophouse in the present case was completed after the prescribed date so as to take it out of the provisions of the Control of Rent Act, 1966.

It is to be observed that in this case there was no shophouse on the site from about the beginning of 1942 until June, 1950 when a certificate of fitness for occupation in respect of the new building was issued. During all those years there was no subsisting tenancy in respect of any premises on the site. To that extent this case differs from the case of *Tioh Kooi Lan* v. *Ismailjee*[3] in which Ali F.J. said:

"Before the fire and after the repairs and alterations to the front portion were completed the tenant remained in occupation and presumably paying the same rent as before. In other words, he was holding on to his tenancy regardless of what had happened."

It is therefore clear that the defendants can seek no protection under the Control of Rent Act, 1966.

In the Hong Kong case their Lordships of the Privy Council agreed with the Hong Kong courts that the respondent was not estopped by having served a notice of increase of rent purporting to be made under the Ordinance and receiving such increased rent. In the present case the plaintiff did serve a notice of increase of rent but there is no evidence that any increased rent has been paid in pursuance of that notice. Indeed, from the time the plaintiff became owner she has refused to accept any rent which, in the circumstances, the defendants have been obliged to pay into court. Thus, the fact that the plaintiff issued a notice of increase of rent does not prejudice her claim to possession.

There being no dispute about the tenancy of the defendants having been duly terminated, the plaintiff is entitled to judgment as prayed in the amended statement of claim. Accordingly, the order of this court will be that the defendants do give vacant possession of the premises on or before 31st December, 1972, that they pay a sum of $340 by way of arrears of rent, and that as from September 1, 1968 to date of delivery of possession they pay double rent by way of mesne profits. There will also be an order that they pay the costs of the action.

Judgment for the plaintiff.

Solicitors: *Yeow & Chin; Chelvam & Co.*

WOON HOE KAN & SONS SDN. BHD. v. BANDAR RAYA DEVELOPMENT BHD.

[O.C.J. (Harun J.) November 11, 1972]

[Kuala Lumpur — Civil Suit No. 153 of 1971]

Contract — Overdue payment — Interest — Contracts (Malay States) Ordinance, 1950, s. 74.

This was a claim for interest on overdue payments. At an earlier hearing ([1971] 2 M.L.J. 213 and [1972] 1 M.L.J. 75, F.C.) the plaintiffs were given leave to sign final judgment for $860,165.17 for work done and the defendants were given unconditional leave to defend the claim in respect of interest for overdue payments. The plaintiffs claimed that interest was 10.8% per annum on monthly rests but the defendants contended that there was no agreement as to the rate of interest payable.

Held: (1) on the evidence there was no contractual rate of interest payable;

(2) in the absence of a contractual rate, the plaintiffs were only entitled to a reasonable rate of interest. A reasonable rate is one which the plaintiffs would have enjoyed as income if the money was paid in time. In all the circumstances of this case, a rate of 5% per annum at simple interest was reasonable.

CIVIL SUIT.

Edgar Joseph Jr. for the plaintiffs.

V. C. George for the defendants.

Harun J.: This is a claim for interest on overdue payments.

At an earlier hearing, [1971] 2 M.L.J. 213 and [1972] 1 M.L.J. 75, F.C., the plaintiffs were given leave to sign final judgment for $860,165.17 for work done and the defendants were entitled to unconditional leave to defend the claim in respect of interest for overdue payments.

The amount for work done is the balance due under two contracts in writing dated 5 July 1966 and 7 July 1967 in respect of certain civil engineering works carried out by the plaintiffs in connection with the development of Bandar Raya off Jalan Bungsar, Kuala Lumpur.

The two contracts provide that the plaintiffs shall submit to the engineer appointed by the defendants before the end of each month a statement of the estimated contract value up to date. The engineer will issue a certificate of permanent work done as he considers reasonable subject to a retention as stated in the conditions of the contract.

The contracts further provide that the defendants shall pay to the plaintiffs the amounts stated to be due by the engineer within 14 days of the issue of the certificate. In both contracts there is a provision that in the event the defendants fail to pay to the plaintiffs the amount due under any certificate of the engineer within 30 days after the same shall have become due, the plaintiffs shall be entitled without prejudice to any other rights or remedies to determine the employment of the plaintiffs under the contract by giving notice in writing to the defendants. But in neither contract is there a provision that interest is payable if payment is not made within 14 days on any certificate becoming due.

In the event payments on these certificates were in fact overdue. The plaintiffs did not exercise their right to determine the contract but instead carried on with the work to completion.

The plaintiffs claim that there was an oral agreement followed by an exchange of letters that interest is payable on all overdue payments. The defendants admit that there was an agreement to pay interest on overdue payments. Be that as it may, I find that this issue is covered by section 74 of the Contracts (Malay States) Ordinance, 1950, see illustration (n) and accordingly hold that in the circumstance of this case interest is payable on all overdue payments.

There is however the issue as to the rate of interest payable. The plaintiffs claim that the rate of interest is 10.8% per annum on monthly rests but the defendants contend that there was no agreement as to the rate of interest payable. There is also the further issue as to when the interest on overdue payments should commence.

The facts are as follows: According to the managing director of the plaintiff company, Mr. Robin, progress payments on the engineer's certificates were delayed but paid in full from December 1967 to early 1969 when payments were not only delayed but not settled in full. Consequently he called on the managing director of the defendant company, Mr. Lim, to press for payment. Mr. Lim asked Mr. Robin for time to make the payments and also for his assistance to raise loans from banks and other financial institutions. Mr. Robin could not raise loans on behalf of Mr. Lim but from the commencement of the contracts had overdraft facilities with his bankers and also a loan from a finance company to meet his commitments under the contract. It is Mr. Robin's contention that Mr. Lim asked him to continue to draw on his financial resources and that he promised to make good the interest rates which Mr. Robin had to pay on the bank overdrafts and the fixed loan from the finance company.

Unfortunately Mr. Lim is dead. According to the secretary of the defendant company, Mr. Ong, there was no agreement as to the rate of interest to be paid up to the time of Mr. Lim's death in June 1972. The evidence regarding the rate of interest payable in the exchange of letters is as follows:

The first letter from the plaintiffs to the defendants is dated 22 April 1969 and reads in part:

"We wish to confirm the many discussions held in your office and through the telephone between your Mr. Lim Chong Hin/ Mr. Robin K.Y. Woon as follows:-

(2) We have made from time to time, temporary loans from various sources to off set our financial difficulty as a result of your delayed payment and have incurred interest thereof. (3) It is agreed that from the date each progress payment falls due (i.e. within 14 days) until the date of payment is made by you, we are to charge you interest at 9% per mensem for that period outstanding."

Mr. Robin in evidence said that "9% per mensem" referred to in paragraph (3) of the letter is a typing error and should read "0.9% per mensem" and that this rate equals to 10.8% per annum. This letter was received by the defendants but there was no reply to it.

The second letter from the plaintiffs to the defendants is dated 31 December 1969 and reads in part:

"Telephonic conversation this morning between your Mr. Lim Chong Hin and the writer refers.

(c) It is agreed between us that all overdue payments are subject to the charge of 10.8% interest per annum payable by Bandar Raya Development Bhd."

The third letter is in reply to the second and is dated 31 December 1969 and reads in part:

"In view of the delayed payments, interest on overdue payments will be paid for."

There is also the evidence of the debit notes sent by the plaintiffs to the defendants. These debit notes claim interest on overdue payments. The first debit note is in respect of the month of February 1969 but dated 31 July 1969 wherein the rate of interest of 10.8% is stated. Subsequent debit notes carry the same rate of interest with the total amounts increasing as compound interest was being charged. The plaintiffs claim that they received no protest from the defendants when the debit notes on interest were sent and therefore silence constituted consent. The defendants contend that acceptance of the debit notes did not constitute consent as to the rate of interest payable as the matter was still subject to negotiation. This was the position at any rate on 31 December 1969. The plaintiffs' letter of that date had the principal objective of obtaining a written confirmation from the defendants that moneys were due to the plaintiffs to satisfy their bankers. The defendants confirmed on the same date by letter the exact amount stated to be due to the plaintiffs but merely confirmed that interest was payable without stating the rate.

The plaintiffs' obligation under the contracts was to do the work and if progress payments were not made in time they were entitled to stop work. They were under no obligation to finance the project as well. The events leading to the exchange of letters on 31 December 1969 show clearly that no agreement had been reached as to the rate of interest payable. On the evidence, I hold that there was no contractual rate of interest payable.

In the absence of a contractual rate, the plaintiffs are only entitled to a reasonable rate of interest. A reasonable rate is one which the plaintiffs would have enjoyed the income if they had had the use of the money if it was paid in time. In all the circumstances of this case, a rate of 5% per annum at simple interest on each certificate outstanding until date of payment is reasonable. As part payments were made from time to time, each payment should constitute payment towards the earlier certificates outstanding and interest calculated on the balance due.

Finally, there is the matter as to when the interest should commence. The plaintiffs claim interest on overdue payments from 22 April 1969. The defendants contend that the first debit notes were not received until 31 December 1969. In the absence of any agreement between the parties as to the date of commencement of interest, I hold that interest is payable on any certificate falling due on or after 22 April 1969.

There will accordingly be judgment for the plaintiffs for interest at the rate of 5% per annum simple interest on any certificate outstanding on or after 22

April 1969 until date of payment and in default of the determination of the amounts due, the registrar shall determine such amounts and the costs of this action.

Judgment for the plaintiffs.

Solicitors: *Joseph & Son; Ng Ek Teong & Partners.*

LEONG YUET HENG v. CHAN THAI & ORS.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) November 15, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 61 of 1972]

Administrative Law — Certiorari and mandamus — Whether appeal lies from decision of Rent Tribunal under Control of Rent Act, 1966, s. 23, to the Rent Appeal Board — Appeal Board deciding it has no jurisdiction — Whether decision should be quashed by certiorari — Mandamus — Control of Rent Act, 1966, s. 12, 13, 15, 16 and 23.

In this case Madam Chan Thai had applied to the Kuala Lumpur Rent Tribunal for a certificate under section 23(1) of the Control of Rent Act, 1966, that certain premises had ceased to be controlled premises. The Rent Tribunal dismissed her application whereupon she appealed to the Kuala Lumpur Rent Appeal Board. The Appeal Board held that it did not have jurisdiction to entertain the appeal. Madam Chan Thai thereupon applied to the High Court for an order of *certiorari* to quash the board's decision and for an order of *mandamus* directing the board to hear and determine the appeal. The High Court holding that a decision of the tribunal under section 23 could be appealed to the board, ordered that the board's order be quashed and ordered the board to hear and determine the appeal. The appellant appealed to the Federal Court.

Held, dismissing the appeal: there is a right of appeal from a decision of the Rent Tribunal under section 23 to the Rent Appeal Board and therefore the learned judge was right in issuing the orders of *certiorari* and *mandamus.*

Cases referred to:-

(1) *Hongkong and Shanghai Banking Corporation, Ipoh* v. *Rent Tribunal for Ulu Kinta & Ors.* [1972] 1 M.L.J. 70.

(2) *Mohamed Ashraff & Anor.* v. *The Commissioner for Federal Capital, Kuala Lumpur & Anor.* [1972] 2 M.L.J. 69.

FEDERAL COURT.

N. A. Marjoribanks (*K. L. Devaser* with him) for the appellant.

R. R. Chelliah for the respondent.

Azmi L.P. (delivering judgment of the court): Madame Chan Thai, the first respondent, owns premises No. 307, Jalan Pudu, Kuala Lumpur. By an agreement dated 17th March, 1961, she granted to Madame Leong Yuet Heng the appellant and to another person a tenancy of the front portion of the first floor for a fixed period of two years and six months from 15th March, 1961. At the end of that period the appellant did not vacate the front portion but remained in possession. (Her co-tenant had retired from the business they ran on the premises and is not concerned in these proceedings.)

It is common ground that the premises were controlled premises and therefore subject to the provisions of the Control of Rent Act, 1966. Section 23 provides for decontrol of controlled premises.

On 8th February, 1968, Madame Chan Thai applied to the Kuala Lumpur Rent Tribunal for a certificate under section 23(1)(a) certifying that the whole of the first floor had ceased to be controlled premises as from 17th September, 1963, and that any person holding the premises after that date ceased to enjoy the protection which he would otherwise have enjoyed under the Act. On 23rd April, 1968, the Rent Tribunal dismissed her application.

She appealed to the Kuala Lumpur Rent Appeal Board. Considering itself bound by an unreported decision of Chang Min Tat J. in Originating Motion No. 6 of 1971 in the Ipoh High Court, the board held that it did not have jurisdiction to entertain the appeal and accordingly dismissed it. The board is the second respondent in this appeal.

Madame Chan Thai applied to the Kuala Lumpur High Court for an order of *certiorari* to quash the board's order and for an order of *mandamus* directing the board to hear and determine her appeal.

On 5th June, 1972, Mohamed Azmi J., holding that a decision of the tribunal under section 23 could be appealed to the board, ordered that the board's order be quashed and commanded the board to hear and determine the appeal.

The appellant appeals to this court.

The main issue is whether or not the board has jurisdiction to hear and determine an appeal against a decision made under section 23 by the tribunal. Mr. Marjoribanks for the appellant argues that the board has no jurisdiction while Mr. Chelliah for the first respondent argues that the board has jurisdiction. We are not concerned here with the merits or demerits of her appeal.

Before going any further it would be convenient to set out the other provisions of the Control of Rent Act that are relevant. They are —

"12. (1) Except for the purpose of section 18A of this Act, there shall be established for any particular area or areas in a State a Rent Tribunal (in this Act referred to as 'the tribunal') consisting of a Chairman and two members appointed in the manner provided under the following subsections.

X X X X X

(5) Unless unanimous, the decision of the tribunal on any matter before it shall be by a majority consisting of the concurring opinions of the Chairman and either of the two members; but where the Chairman disagrees with both members notwithstanding that both members may agree between themselves, no decision shall be deemed to have been arrived at, and the matter shall forthwith be referred for a decision to the Appeal Board constituted under section 15 for the area in which the controlled premises in question are situated; and the decision so made shall be final and shall not be questioned in any Court.

X X X X X

13. (1) Upon an application by any landlord or a tenant or any person interested, the tribunal shall have and may exercise the following powers, namely —

(a) to hear and determine any application for the purpose of determining the fair rent of any controlled premises where the fair rent determined by a Rent Officer under the provisions of this Act is not accepted by either the landlord or the tenant;

(b) to hear and determine any application made under section 20 for the purpose of apportioning and determining the